PP

v.

SHATISRUBEN ITHAYAKUMAR & ORS

HIGH COURT MALAYA, SHAH ALAM
NOOR AZIAN SHAARI J
[CRIMINAL TRIAL NO: 45C-149-2011]
10 JULY 2013

CRIMINAL LAW: *Kidnapping Act 1961 - Section 3 - Confining person with intention to hold for ransom - Victim kidnapped and released after payment of ransom - Ransom money recovered from accused - Whether victim wrongfully confined or restrained for ransom - Whether elements of offence proven - Whether common intention proven - Penal Code ss. 339, 340 & 362*

CRIMINAL PROCEDURE: *Sentencing - Kidnapping - Factors to be considered in sentencing - Whether victim safe and well treated - Whether accused ought to be sentenced to life imprisonment instead of death penalty*

The three accused were jointly charged with the offence of kidnapping under s. 3 of the Kidnapping Act 1961 ('the Act'). SP11 ('the victim') testified that she was abducted, confined to a room and later released. She could identify all the three accused and relate what each of them did or the parts they played in the whole incident. SP11 was released after a ransom of RM30,000 was paid. About an hour after SP11 was released, SP12 and his team of police officers stopped the three accused near a traffic light. The first and second accused were in an Avanza car whilst SP3 was riding a motorcycle. The ransom money of RM30,000 was recovered from the first and third accused. All the accused claimed trial to the charge.

Held (convicting all three accused):

(1) Pursuant to s. 3 of the Act, it was incumbent for the prosecution to prove: (a) a person was abducted or wrongfully confined or restrained; and (b) the confinement or restraint was 'for ransom'. On top of the two elements, in this case, the prosecution had to prove another element, *ie*, common intention as the charge stated that it was to be read together with s. 34 of the Penal Code. (paras 4, 5 & 6)

(2) There was more than sufficient evidence that SP11 was abducted, confined and/or restrained against her wishes by the three accused. The confinement/restraint was as what is defined by s. 3 of the Act

A and meets the requirements of ss. 339, 340 and 362 of the Penal Code. SP11 could not proceed in any direction or proceed beyond certain limits. (para 11)

(3) Not only was the money (ransom) demanded but was also paid. The ransom monies were found with the first accused and the second accused by SP14 at the scene when the car (Avanza) driven by the third accused met with an accident. (para 20)

(4) There was without a doubt that all three accused had played a part or more than a part in the abduction, confinement and/or restraint of SP11 and asking for/collecting of the ransom. There was common intention. (paras 21 & 26)

(5) The evidence of all the three accused were bare denials and afterthoughts. They were never put to the prosecution at the earliest possible opportunity. The 'stories' of all the three accused being a belated defence and not being reasonable, logical or probable; did not cast a reasonable doubt in the prosecution case whilst on a maximum evaluation of the evidence before the court, the prosecution had proven a case beyond a reasonable doubt against them as charged. (paras 37 & 38)

(6) The fact that the victim was safe and well treated was taken into account in sentencing the accused to life imprisonment instead of the death penalty. (para 43)

Case(s) referred to:
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
Prabah Sinnathamby v. PP [2010] 2 CLJ 690 CA ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***

Legislation referred to:
Kidnapping Act 1961, ss. 2, 3
Penal Code, ss. 34, 339, 340, 362

For the prosecution - Muhammad Asyraf Md Kamal; DPP
For the 1st accused - M Manoharan; M/s M Manoharan & Co
For the 2nd accused - Wan M Razali Wan M Kadir; M/s Zaman Peng & Chan
For the 3rd accused - Sreekant Pillai; M/s Sreekant Pillai

Reported by Amutha Suppayah

JUDGMENT

Noor Azian Shaari J:

[1] The three accused were jointly charged as follows:

> Bahawa kamu bersama-sama pada 1 Disember 2010 jam lebih kurang 5.45 pagi di sekitar kawasan hadapan Rumah No. 10A, Jalan 8A, Selayang Baru, Batu Caves, di dalam daerah Gombak, dalam Negeri Selangor Darul Ehsan, di dalam mencapai niat bersama kamu, bagi mendapatkan wang tebusan sebanyak RM30,000 telah menahan seorang perempuan bernama Vijaiya a/p Mariappan (No. K/P: 870910-08-5250) dengan cara melarikan secara salah, oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 3 Akta Penculikan 1961 (Semakan 1989)(Akta 365) dibaca bersama seksyen 34 Kanun Keseksaan.

[2] All the accused claimed trial to the charge.

[3] For the trial, the prosecution called 14 witnesses to testify, they being:

(a) SP1 - Lance Corporal Abdul Hisham bin Sahi
- Photographer, IPD Gombak

(b) SP2 - Sergeant Mohamed Anwar bin Ahmad Tarmizi
- Photographer, IPK Selangor

(c) SP3 - Chief Inspector Mazli bin Jusoh @ Che Kob
- Forensic, IPK Selangor

(d) SP4 - ASP Lee Kui Lin
- Senior Investigation Officer, IPD Gombak

(e) SP5 - Sivarajan a/l Muniandy
- Brother in law of the victim (SP11)

(f) SP6 - Nor Aidora binti Saadon
- Chemist

(g) SP7 - Gunalan a/l Nadarajan
- Brother in law of SP8

(h) SP8 - Luci a/l Muniandy
- Younger sister of SP5

(i) SP9 - Inspector Muhammad Adib bin Rasul
- Analyst, Computer Crime Section, PDRM Forensic Lab

(j) SP10 - Abdul Hail bin Ahmad Tarmizzi
- Chemist (DNA)

A (k) SP11 - Vijaiya a/p Mariappan
- Victim

(l) SP12 - ASP Mohd Aminuddin bin Aziz
- Arresting Officer, D9 IPK Selangor

B (m) SP13 - ASP Visvanathan a/l Paramasivam
- Senior Investigation Officer, IPD Gombak

(n) SP14 - ASP Tan Hooi Heng
- Senior Investigation Officer, IPD Gombak

C **[4]** Section 3 of the Kidnapping Act 1961 (Act 365) (hereinafter referred to as "the Act") states as follows:

> 3. Abduction, wrongful restraint or wrongful confinement for ransom
>
> Whoever, with intent to hold any person for ransom, abducts or
D wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

[5] From the wordings, it is incumbent for the prosecution to prove:

E (a) a person was abducted or wrongfully confined or restrained; and

(b) the confinement or restraint was "for ransom".

[6] On top of the two elements, in this case, the prosecution would have to prove another element, ie, common intention as the charge states
F that it is to be read together with s. 34 of the Penal Code which states as follows:

> 34. Each of several persons liable for an act done by all, in like manner as if done by him alone
>
G When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[7] Now the evidence adduced by the prosecution will be examined to see if the three elements or ingredients have been proven by the
H prosecution. The elements will be referred to as follows:

(a) Wrongful confinement/restraint;

(b) Ransom; and

I (c) Common intention.

Wrongful Confinement/Restraint

[8] Sections 2 of the Act defines "wrongful restraint", "wrongful confinement" and "abduction" as follows:

> "wrongful restraint", "wrongful confinement" and "abduction" shall have the meanings assigned to them in sections 339, 340 and 362 respectively of the Penal Code [Act 574].

[9] Further, ss. 339, 340 and 362 of the Penal Code states as follows:

> **Section 339 of the Penal Code:**
>
> Wrongful restraint
>
> Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.
>
> **Section 340 of the Penal Code:**
>
> Wrongful confinement
>
> Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.
>
> **Section 362 of the Penal Code:**
>
> Abduction
>
> Whoever by force compels or by any deceitful means induces any person to go from any place, is said to abduct that person.

[10] The evidence of SP11 (Viyaiya a/p Mariappan, the victim) is very clear and not shaken at all in cross-examination of the facts that she was abducted, confined to a room and later released. She could identify all the three accused and relate what each of them did or the parts they played in the whole incidence. Her evidence is that:

(a) On the morning of 1 December 2010, she was walking towards the house where SP8 (Luci) stayed in order to go together for their nursing practical at Taman Desa Medical Centre;

(b) While walking, a Toyota Avanza that was parked at the road side started moving towards her and stopped in a position such as to obstruct her;

(c) Then she said, "saya nampak seorang lelaki yang kurus turun dari kereta dan dia pegang kain hitam di tangannya. Saya terkejut dan berhenti dan lari patah balik ke belakang. Lelaki kurus terus datang

ke arah saya dan tangkap. Saya jerit dan cuba lepaskan tangan saya daripada genggaman orang itu. Tiba-tiba seorang lelaki yang gempal bercermin mata turun daripada tempat pemandu kereta tarik rambut saya dan kedua-dua tarik saya masuk dalam kereta;

(d) In the said car there were three other people beside herself. The two men she mentioned earlier and "seorang lagi perempuan kurus". She said "Nampak ketiga-tiga mereka";

(e) She was able to identify all the three persons mentioned above ie, accused 1, 2 and 3 in court;

(f) After she was pushed into the car, the car moved and stopped at a "kawasan perumahan" where she saw the driver (accused 1) and accused 2 got out of the car and changed the car registration plate;

(g) After the car moved, accused 3 covered her eyes with a piece of black cloth;

(h) Subsequently she was confined to a room with a toilet outside until she was taken by car on the 4 December 2010 and released;

(i) While being confined to the room, SP11 said in no uncertain terms the followings:

(i) sepanjang saya ditahan, lelaki kurus yang menjaga saya - dia adalah OKT1; and

(ii) ada perempuan kurus masuk bilik saya dan mengawasi saya. Dia pun ugut saya. Dia pun ugut saya kalau keluarga saya lambat cari wang tebusan, saya akan dihantar ke kumpulan Cina di Pahang.

(j) SP11 was released in the early hours of 4 December 2010 around the area of Changkat Bukit Bintang after SP7 had paid a ransom of RM30,000; and

(k) On the 4 December 2010 about an hour after SP11 was released, SP12 and his team consisting of two officers and eight police personnel stopped all the three accused near the traffic light Batu 16, Rawang. accused 1 and 2 were in the Avanza whilst SP3 was riding a motor-cycle. The ransom money of RM30,000 was recovered from accused 1 and 3.

[11] From the evidence of the accused as stated above, there is more than sufficient evidence that SP11 was abducted, confined and/or restraint against her wishes by all the three accused. The confinement/restraint is as what is defined by s. 3 of the Act and meets the requirements of ss. 339, 340 and 362 of the Penal Code. SP11 could not proceed in any direction or proceed beyond certain limits.

[12] In fact there is no reason to doubt the evidence of SP11.

[13] In respect of the issue of confinement/restraint, learned counsel for the accused 2 submitted that since there were opportunities for SP11 to escape eg, the window of the room where she was confined to was only covered by a plywood, there is no element of confinement.

[14] On this issue, it is irrelevant, so long as the victim was confined or restraint, this element is fulfilled.

Ransom

[15] "Ransom" is defined in s. 2 of the Act as follows:

> 'ransom' means any money, price or consideration paid or demanded for the release of a person abducted or wrongfully confined or wrongfully restrained.

[16] In respect of the ransom, the learned counsel for accused 3 raised an issue ie, the monies recovered from the Avanza/accused 1 are not the monies paid.

[17] From the evidence it is not disputed that there are a few differences in the recording by SP7 P58B(1) - (16), P82A(1)-(3) and P83A(1)-(4) and the notes P90B(1)-(100), P90C(1)-(90), P90D(1)-(70), P90E(1)-(40), P90F(1)-(100), P90G(1)-(100) and P90H(1)-(100). However those differences are few and are in respect of the placing of some of the alphabets and numbers of the serial number of the notes.

[18] However, it must be noted that payment of the ransom is not an ingredient of the offence. When s. 3 of the Act is read carefully, it only says "with intent to hold any person for ransom". Ransom need not even be paid.

[19] However, the following findings of facts were established:

(a) Communications and contacts between the accused and the family of SP11 *via* telephone calls and SMS that were made and sent through the telephone of SP11 (010-267 217) to the telephone of SPP11 (014-638 9892);

(b) After SP11 was abducted, SP8 received SMS from SP11's phone asking for the sum of RM30,000;

(c) SP8 gave evidence that while SP11 was confined, messages were sent to her (SP8) phone from the phone of SP11;

(d) Both the said phones were sent for analysis and SP9, the analyst from the Seksyen Jenayah Komputer, Makmal Forensik, Cheras, PDRM confirmed the SMS sent and received by both the said phones;

(e) The analysis was recorded in a CD (P80) and the said CD was shown in the court whilst SP9 gave evidence. There is no doubt at all the messages were sent and received from both phones for the period of 1 December 2010 until 4 December 2010;

(f) SP11 also stated that she was threatened ("ugut") that if her family failed to pay the amount, she would be handed over to a "kumpulan lelaki Cina yang ramai dan jahat";

(g) The monies were indeed prepared and handed over;

(h) The same monies were later found by SP12 when the Avanza met with an accident on the Batu 16, Kuala Lumpur-Rawang road in the early morning of 4 December 2010.

[20] Therefore, in this case, not only was the money (ransom) demanded but was also paid. Later on the ransom monies were found with accused 1 and accused 2 by SP14 at the scene when the car (Avanza) driven by the accused 3 met with an accident.

Common Intention

[21] In respect of this ingredient, there is without a doubt all three accused had played a part or more than a part in the abduction, confinement and/or restraint of SP11 and asking for/collecting of the ransom.

[22] Just to cite a few examples of the parts played by each of the three accused which are fully supported by evidence:

Accused 1

(a) Got out of the car and help accused 3 pushed SP11 into the car;

(b) Drove the car and changed the number plate; and

(c) Spoke to SP11 on the way to be released on the 4 December 2010.

Accused 2

(a) Was in the car when SP11 was abducted; and

(b) Was at the place of confinement/restraint.

Accused 3

(a) Approached SP11 on the morning of 1 December 2010; and

(b) He was at the place of confinement/restraint.

[23] Therefore all of them did do more than one act (in fact overact) in furtherance of the kidnapping of SP11. Indeed, there was common intention.

[24] With regards to common intention, in the Court Appeal case of *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466, Gopal Sri Ram JCA (as he then was) said:

> Thus to attract s. 34 IPC two postulates are indispensable; (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
>
> Looking at the first postulate pointed out above, **the accused who is to be fastened with liability on the strength of s. 34 IPC should have done some act which has nexus with the offence**. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s. 32 IPC. So the act mentioned in s. 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, s. 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of s. 34 IPC. (emphasis added)

[25] Since all the ingredients of the charge had been proven, the prosecution had proven a *prima facie* case against all the accused. All the accused were called to enter their defences.

Defences

[26] After the defence was called, accused 1 and 2 elected to give evidence from the dock whilst accused 3 chose to give evidence on oath.

[37] The statement of the accused 1 was tendered and marked as exh. D100 which he read it in court.

[28] Basically accused 1 denied having been involved in the said crime. Over and above the denial, the first accused asked the following questions:

(a) SP11 did not know him prior to 1 December 2010 and since the accident happened in the early hours of the morning, how could SP11 identify him. The accused 1 also said that the identification parade was not properly conducted;

(b) The accused 1 said that he did not restraint SP11 nor did he rent the house where SP11 said she was restrained; and

(c) He denied having asked for ransom and questioned the prosecution for not producing photographs of the ransom money that was found.

[29] The accused 2 also tendered a statement exh. D101 which was read from the dock. In respect of the accused 2, it is also just a denial. Whilst admitting that the Avanza car belonged to her father, she stated that she never left the house early in the morning as she always got up at 9am as she was not schooling and sometimes woke up only in the afternoon if not woken by her mother.

[30] The accused 2 also denied having been to the house in question.

[31] With regards to the incident on the night of 3 December 2010, she admitted having gone out with the accused 1 and later stopped by the police, but denied that the police found the money on her.

[32] Once the defence is called, the onus on the defence is only to cast a reasonable doubt in the prosecution case. Now to examine if the defence has cast a reasonable doubt in the prosecution case.

[33] The statements of both accused 1 and 2 though given from the dock and not subjected to cross-examination are in fact evidence save that what weight should be given to them/such evidence.

[34] The following facts render the evidence of accused 1 and 2 as unreasonable with lots of gaps that cannot be explained:

(a) Accused 1 stated that he did not know accused 3 whilst the latter in his evidence stated he knew accused 1 about one and a half (1 1/2) months before the incident;

(b) Accused 1 denied about the house in Selayang whilst accused 3 confirmed the presence of accused 1 in the house on 3 December 2010;

(c) The DNA of accused 1 was found on a pillow (P43A) in the house which was not explained by accused 1;

(d) Accused 1 did not state anything about the fact that the prosecution evidence that he led the police to the house;

(e) The DNA of the accused 2 was also found (E24 - hair) which was not explained;

(f) Accused 1 and 2 denied going to Bukit Bintang to collect the ransom whilst accused 3 said otherwise;

(g) No explanation about the Avanza that belonged to the father of accused 2 that met with an accident and notes were strewn all over;

(h) Both accused 1 and 2 did not explain about some personal items belonging to SP11 found at the scene of the accident; and

(i) Both accused 1 and 2 only denied knowing SP11.

[35] On the questions raised by the accused 1:

(a) There was no real challenge on the identification parade;

(b) SP11 could positively identify the accused 1 (dock identification) and she had given reasons why she could identify him;

(c) Even if accused 1 did not restraint SP11 (which is not true) he did other things in the inciden as stated above; and

(d) Photographs are only aids. There is no law that they must be produced. There is more than ample evidence to show that the ransom money was paid and later recovered.

[36] On the other hand, the accused 3 stated otherwise but also left many questions unanswered:

(a) He did not explain/clarify SP11's evidence that he grabbed the phone from SP11 and during all the time that SP11 was confined to the house accused 3 was holding the phone;

(b) Accused 3 stated that he was asked by accused 1 to help him collect the ransom money. This is just unreasonable in view of the fact that accused 3 himself had stated that he had just known accused 1 (in fact for only about 1 1/2 months before the incident); and

(c) Accused 3 saw SP11 twice but did not ask why she was there.

[37] Therefore it appeared that the evidence of all three accused are bare denials and afterthoughts. They were never put to the prosecution at the earliest possible opportunity - *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154:

> Although in our criminal jurisprudence, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought. Or a recent invention as happened in this case.

[38] The "stories" of all three accused being:

(a) Being a belated defence; and

(b) Not being reasonable, logical or probable,

were not able to cast a reasonable doubt in the prosecution case whilst on a maximum evaluation of the evidence before the court, it is found that the prosecution had proven a case beyond a reasonable doubt against all the accused as charged. All the accused were found guilty as charged and convicted.

[39] Before sentence was passed, the learned counsels of all the accused pleaded in mitigation as follows:

Accused 1

(a) Complainant (SP11) was not injured;

(b) Complainant was not sexually assaulted;

(c) Ransom money was recovered;

(d) Complainant was sent back safely;

(e) Complainant was given proper meals and not left to starve;

(f) Accused 1 is only 25 years old;

(g) Two representations were forwarded to the Attorney Generals Chambers but were turned down;

(h) Accused 1 only wanted to settle a debt of RM25,000;

(i) No intention to make a profit;

(j) Only son and only bread winner after his mother's death;

(k) He repents; and

(l) Ask for a second chance.

Accused 2

The learned counsel adopted the plea in mitigation of the accused 1 where relevant and further stated:

(a) Accused is only 25 years old;

(b) Eldest child in a family of five. Parents at home;

(c) Had no intention;

(d) Offered to plead guilty to a lesser charge;

(e) The father's car was a total loss;

(f) One month after accused 3 was arrested her father was dismissed from his job and then faced public hatred. Now he is only doing odd jobs;

(g) The mother has become a recluse;

(h) He's young and has a long way to go; and

(i) Ask to temper justice with mercy.

Accused 3

(a) He was 17 years of age when he was arrested;

(b) First offender;

(d) Parents separated;

(e) Youngest of six siblings;

(f) Victim (SP11) was not injured;

(g) No violence on the victim; and

A (h) In the case of *Prabah Sinnathamby v. PP* [2010] 2 CLJ 690, the Court of Appeal upheld the life sentence imposed by the High Court for an offence under s. 3 of the Act.

[40] An offence under s. 3 of the Act carries a sentence of "death or imprisonment for life and shall, if he is not sentenced to death also be liable to whipping".

B

[41] The learned deputy public prosecutor submitted that there are no authorities to guide when life imprisonment or death sentence should be imposed and he left it to the court. On this point, all three counsels agreed.

C

[42] After hearing all the submissions, all the three accused were sentenced to life imprisonment. The accused 1 and 3 were each given six strokes of whipping.

D

[43] When the law provides for a sentence as stated as in s. 3 of the Act, ie, either life imprisonment or death without any guide lines it's a very difficult decision to undertake. However it would seem that the plea by the learned counsel that the victim was safe, well treated etc would make a difference as opposed to one who was sexually assaulted, injured or even found dead. Therefore it would appear that the factors mentioned should be considered in deciding whether its life or death.

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